Salmah bte Sulaiman & Anor (Administratrices of the estate of Ahmad bin Ibrahim, deceased) v Metroplex Development Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-31-94

ZAKARIA YATIM, NH CHAN AND MAHADEV SHANKAR JJCA

10 SEPTEMBER 1996

***Contract** — Building contract — Delay — Whether developer liable for delay to supply water and electricity — Developer connected electrical and water internal mains to the external mains — Whether the developer's obligation include the actual supply of water and electricity — Housing Developers (Control and Licensing) Rules 1970 r 12(1)(l)*

The appellants were the administratrices of the estate of the deceased. The respondent was a housing developer. By a sale and purchase agreement ('the agreement') dated 4 April 1981, the deceased purchased from the respondent a house in Ampang ('the house'). By cl 18 of the agreement, the respondent agreed to deliver vacant possession of the house to the deceased not later than 3 October 1982. The appellants alleged that the respondent delivered the keys to the house on 25 July 1984, but there was no supply of water and electricity until January 1985. The appellants therefore claimed liquidated damages for late delivery calculated from 4 October 1982 to 25 January 1985. The respondent contended that the house was delivered to the appellants on 31 March 1983 and that under cl 18 of the agreement, the appellants were only entitled to claim for damages for delay in delivery of vacant possession, and therefore the appellants could not claim damages for any delay caused by the relevant authorities to supply water and electricity to the house. The respondent alleged that the internal electricity and water mains were connected to the external mains on 31 March 1983. The sessions judge held that damages for late delivery was to be calculated from 3 October 1982 to 31 March 1983 and this was confirmed by the High Court. The appellants appealed.

Held, dismissing the appeal:

(1) Rule 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970 ('the rule') speaks of *connection* of the electrical and water mains and that the respondent's obligation was only to connect the electricity and water mains to the internal electricity and water mains and not to supply the flow of water and electricity. The supply of water and electricity were the responsibility of the relevant authorities (see p 372F).

(2) Clause 18 of the agreement was consistent with the rule and it explicitly provided that the respondent shall not be responsible or liable for any delay on the part of the relevant authorities to supply water and electricity. Vacant possession was therefore, delivered to the appellants on 31 March 1983 (see pp 372I and 373A).

[Bahasa Malaysia summary

Perayu-perayu adalah pentadbir harta pusaka si mati. Penentang adalah pemaju perumahan. Melalui suatu perjanjian jual beli ('perjanjian tersebut') bertarikh 4 April 1981, si mati membeli sebuah rumah di Ampang ('rumah tersebut') daripada penentang. Mengikut fasal 18 perjanjian tersebut, penentang bersetuju untuk menghantar-serah milikan kosong rumah tersebut kepada si mati tidak lewat daripada 3 Oktober 1982. Perayu-perayu mengatakan bahawa penentang menghantar-serah kunci kepada rumah tersebut pada 25 Julai 1984, tetapi tidak ada bekalan air dan elektrik sehingga bulan Januari 1985. Oleh itu, perayu-perayu menuntut ganti rugi jumlah tertentu bagi kelewatan hantar-serah dikira daripada 4 Oktober 1982 hingga 25 Januari 1985. Penentang berhujah bahawa rumah tersebut dihantar-serah kepada perayu-perayu pada 31 Mac 1983 dan di bawah fasal 18 perjanjian tersebut, perayu-perayu hanya berhak untuk menuntut ganti rugi bagi kelewatan hantar-serah milikan kosong, dan dengan itu tidak boleh menuntut ganti rugi atas apa-apa kelewatan yang disebabkan oleh pihak berkuasa yang berkenaan untuk membekalkan air dan elektrik kepada rumah tersebut. Adalah dihujahkan bahawa salur utama dalaman disambungkan kepada salur utama luaran pada 31 Mac 1983. Hakim mahkamah sesyen memutuskan bahawa gantirugi bagi kelewatan hantar-serah hendaklah dikira daripada 3 Oktober 1982 hingga 31 Mac 1983 dan ini disahkan oleh Mahkamah Tinggi. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) Kaedah 12(1)(l) Kaedah-Kaedah Pemaju Perumahan (Kawalan dan Pelesenan) 1970 ('kaedah tersebut') menyebut berkenaan dengan *sambungan* salur utama elektrik dan air dan bahawa tanggungjawab penentang hanya untuk menyambungkan salur utama elektrik dan air kepada salur utama elektrik dan air dalaman dan bukannya pembekalan aliran air dan elektrik. Pembekalan air dan elektrik adalah tanggungjawab pihak berkuasa yang berkenaan (lihat ms 372F).

(2) Fasal 18 perjanjian tersebut adalah konsisten dengan kaedah tersebut dan ia memperuntukkan secara eksplisit bahawa penentang tidak akan bertanggungjawab atau menanggung liabiliti bagi apa-apa kelewatan pihak berkuasa yang berkenaan dalam membekalkan air dan elektrik. Oleh yang demikian, milikan kosong telah dihantar-serah kepada perayu-perayu pada 31 Mac 1983 (lihat ms 372I dan 373A).]

Notes

For cases on delay in building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1286–1289.

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Rules 1970 r 12(1)(l)

Appeal from: Civil Appeal No R2–12–10–94 (High Court, Kuala Lumpur)

Won Walter Pereira (*Kemkumar S Lopez* with him) (*Kamarudin & Partners*) for the appellants.
Tan Ming-Li (*Allen & Gledhill*) for the respondent.

Cur Adv Vult

Zakaria Yatim JCA (delivering the judgment of the court): The appellants are the administratrices of the estate of Ahmad bin Ibrahim ('the deceased'). The respondent is a housing developer within the meaning ascribed to it under the Housing Developers (Control and Licensing) Act 1966.

By a sale and purchase agreement ('the agreement') entered into between the deceased and the respondent on 4 April 1981, the deceased purchased from the respondent a house and land known as Lot No 1338, Type B3, Taman Muda, Ampang under the title HS (D) 2544 to 2552 for Lot Nos 10093 to 10101, Mukim of Ampang, District of Ulu Langat ('the house') for the purchase price of RM92,950. By cl 18 of the agreement, the respondent agreed to deliver vacant possession of the house to the deceased not later than 3 October 1982. The appellants alleged in the statement of claim that the respondent, in breach of the agreement, delivered the keys to the house on 25 July 1984, but there was no supply of water and electricity until January 1985. The appellants therefore claimed liquidated damages for late delivery calculated from 4 October 1982 to 25 January 1985 in the sum of RM17,398.20 together with interest and general damages.

The respondent contended that the house was delivered to the appellants on 31 March 1983 and the delay was only for 179 days and not as alleged by the appellants. The respondent said that under the agreement, the appellants were only entitled to claim for liquidated damages for delay in delivery of vacant possession by the respondent, and this did not include any delay caused by the relevant authorities to supply water and electricity to the house.

The learned sessions judge decided that damages for late delivery was to be calculated from 3 October 1982 to 31 March 1983 for the delay of a period of 179 days. On appeal to the High Court, Siti Norma Yaakob J (as she then was) confirmed the decision of the learned sessions judge. In her grounds of judgment, she said:

> There is no evidence to show otherwise although as at 31 March 1983, the house was not yet supplied with water and electricity. As the supply of such amenities is not the responsibility of the respondent, I consider that delivery

of vacant possession had been validly effected on 31 March 1983, for as at that date, the respondent had fulfilled all their statutory and contractual obligations both under the Rules and under the agreement. The fact that water and electricity were supplied very much later is due very much to the delay of the relevant authorities, for which the respondent cannot be faulted and for which they had been exempted by cl 18 of the agreement. On that finding, I have no reason to disturb the decision of the sessions court and I had accordingly dismissed the appellants' appeal with costs.

The respondent contended that it had delivered vacant possession of the house on 31 March 1983. Miss Tan Ming-Li submitted that the internal mains were connected to the external mains on 31 March 1983. The appellants said that on that date the house was not supplied with electricity. Mr Walter Pereira, counsel for the appellants argued that under cl 18 of the agreement, vacant possession of the house was delivered when there was flow of water and electricity into the house. He said that electricity was supplied to the house only on 16 February 1985. It was also the appellants' contention that water was supplied to the house in January 1985.

It is now necessary to examine the relevant provision of the law and the relevant clause in the agreement. Rule 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970 ('the rule') states as follows:

(l) provisions binding on the licensed housing developer that he shall at his own costs and expenses cause the connection of electricity, water and sewerage mains of the Appropriate Authority or public authority with the internal electricity, water and sewerage mains of the housing accommodation erected for the purchaser.

We agree with Siti Norma Yaakob J that the rule speaks of *connection* of the electrical and water mains and that the respondent's obligation was only to connect the electricity and water mains to the internal electricity and water mains and not to supply the flow of water and electricity.

Clause 18 of the agreement states as follows:

(18) Subject to cl 33 hereof and/or to any extension or extensions of time as may be allowed by the controller, the said building shall be completed and ready for delivery of possession to the purchaser within 18 calendar months from the date of this agreement save that the vendor shall not be responsible or liable for any delay on the part of the relevant authorities to supply water and/or electricity to the said building.

Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period, delay cause by circumstances set out in cl 33 hereof or delay on the part of the relevant authorities to supply water and/or electricity excepted, then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

The above clause is consistent with the rule. The clause explicitly provides that the developer shall not be responsible or liable for any delay on the

A part of the relevant authorities to supply water and electricity. We agree that vacant possession was delivered to the appellants on 31 March 1983.

In our view, the rule and cl 18 of the agreement clearly state that the duty of the developer is only to connect the electricity and water mains to the internal mains. The supply of water and electricity are the responsibility
B of the relevant authorities.

For the reasons stated above, we dismiss the appeal with costs.

Appeal dismissed.

C Reported by Jafisah Jaafar

D

E

F

G

H

I